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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 567

JAMES R. HOFFA, *Petitioner*,

v.

HONORABLE FRANK GRAY, JR., United States District Judge for the Middle District of Tennessee, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October, 1963

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on September 20, 1963.

OPINION BELOW

The opinion of the court of appeals, (App. A, *infra*, pp. 1a-2a) has not yet been reported.[1] A

[1] Nine printed transcripts of the mandamus proceedings in the court below have been filed with the Clerk of this Court and will be referred to as PRT.

Memorandum was filed on August 29, 1963, by the district court subsequent to the filing of petition for mandamus in the court of appeals on August 26 and, therefore, is not part of the record filed with the Clerk of this Court.

JURISDICTION

The order and judgment of the court of appeals was entered on September 20, 1963. (App. A, *infra*, p. 2a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where, on motion to dismiss an indictment in a federal criminal case, the defendant alleges and offers to prove that members of substantial and important minority groups have been systematically discriminated against and virtually totally excluded from grand jury service, in violation of the Fifth Amendment to the United States Constitution and statutes governing the selection of juries, is the decision by the District Court to refuse to permit judicial inquiry into the facts reviewable by the court of appeals on writ of mandamus?

2. Where, on motion to dismiss an indictment in a federal criminal case, the defendant alleges and offers to prove that the indictment was returned by a grand jury *specially convened* to consider charges concerning that defendant, branded as a public enemy by the present Administration and made the object of manifold criminal prosecutions, all unsuccessful to date, including prosecutions for using the mails to defraud, that the

district court publicly announced and the news media continuously emphasized this to be the purpose of the specially convened grand jury, and that the jury commission delegated its statutory duty to select the grand jurors to United States Postmasters, Acting Postmasters, officers of federally supervised banks and state court officials, is the decision by the district court to refuse to permit judicial inquiry into the facts or to dismiss the indictment for the prejudice inherent in the situation reviewable by the court of appeals in writ of mandamus?

3. Whether the court of appeals has the power on writ of mandamus to review the denial by the district court of the motion to transfer where a defendant in a federal criminal proceeding, on motion for transfer under Rule 21(a) of the Federal Rules of Criminal Procedure, establishes that there has been widespread and continuing hostile and inflamatory publicity in the District where the prosecution is pending, and that a considerable amount of the derogatory and defamatory publicity is directly or indirectly the result of actions by officials of the Department of Justice?

4. Whether an indictment returned by a grand jury whose transcripts of testimony of witnesses were delivered daily to an unauthorized person in violation of Federal Rule of Criminal Procedure 6(e), and then used by unauthorized persons so as to deprive the grand jury of secrecy of action is void and is such violation of the Federal Rules of Criminal Procedure, reviewable by the court of appeals in writ of mandamus?

STATUTES AND RULES INVOLVED

Section 332 of Title 28 U.S.C. provides:

> . . . Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Section 1651 (a) of Title 28 U.S.C. provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 1864 of Title 28 U.S.C. provides:

> The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.
>
> The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.
>
> Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.
>
> The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least three hundred names or such larger number as the court determines.
>
> This section shall not apply to the District of Columbia.

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> Secrecy of Proceedings and Disclosures. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury . . .

Rule 21(a) of the Federal Rules of Criminal Procedure provides:

> For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

STATEMENT

Petitioner is a defendant in the criminal action, *United States v. James R. Hoffa, et al.*, Criminal No. 13383, instituted in the United States District Court for the Middle District of Tennessee. This petition derives from a mandamus proceeding in the Court of Appeals below. Since the mandamus cause grows out of the criminal proceeding, the facts are set forth chronologically beginning with events in the district court.

Petitioner *timely* moved in the district court to have the indictment dismissed on the ground that the method of selecting the grand jury had been infected with fundamental error, depriving petitioner and his co-defendants of their right under the Constitution to a fair and impartial grand jury. Petitioner also moved for a transfer of the case under Rule 21(a) of the Federal Rules of Criminal Procedure, on the ground that he could not obtain a fair and impartial trial in the Middle District of Tennessee.[2]

Petitioner moved, further, for dismissal of the indictment because of the flagrant lack of secrecy of the grand jury proceedings in that daily transcripts of the notes of testimony before the grand jury were given to an investigator, not an attorney for the government, and special agents of the Federal Bureau of Investigation in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.

A. The Motion to Dismiss the Indictment

1. Petitioner's motion challenging the composition of the grand jury made a two-pronged attack. First, petitioner alleged and offered to prove that there had been systematic exclusion of prospective jurors on the grounds of race, religion and economic status. The system employed to fill the jury box, from which the grand jury panel had been drawn, effected the virtually total exclusion of Negroes, Roman Catholics, Jews, manual laborers, and members of organized labor.

[2] All seven defendants joined in the motion to dismiss the indictment. Those who did not join in the motion to transfer expressly waived, in the district court, any objection to an order transferring the case, and joined in the petition for mandamus.

On January 9, 1968, some 400 names were placed into the empty jury box by the Jury Commissioner and the Clerk of the Middle District of Tennessee. Immediately, a venire of 100 names was drawn at random from the box. Ultimately the persons who comprised the grand jury panel were selected from the one hundred. On elementary statistical principles, the one hundred names drawn randomly from the box are a close reflection of the 400 names that were in the box. Analysis of the one hundred names drawn reveals the virtually total exclusion of significant minority groups as prospective jurors.

To illustrate, the latest census reports that 13.6% of the population in the Middle District of Tennessee are non-white. Adherents of the Roman Catholic faith number 12% of the population, and 2% are Jewish. Together these groups comprise more than one-fourth of the population. Yet it appears that only about 5% of the names that were placed into the jury box were names of persons from these groups as token representation of substantial and important minority groups in the community. There was also an obvious sharp discrimination in the selection of jurors against members of unions and the "blue collar" class.

It is important to recount the extraordinary events that led to this contamination of the federal jury. As will be clear, it was the *system* employed by those charged with the responsibility of selecting federal jurors that produced this intolerable result. *By statute*, the task of preparing lists of prospective federal jurors is given to a Jury Commissioner and the Clerk of each District Court, or his deputy. 28 U.S.C. § 1864. In the Middle District of Tennessee, the Jury Commissioner, appointed by the court, is

Howard H. Climer. The Clerk is Andrew H. Mize
Mr. Climer and Mr. Mizell followed a system in filli
the jury box in January, 1963, that inevitably pr
duced the gross discrimination that has been reveal

The Clerk and the Jury Commissioner made
effort to utilize the many available indices that mig
be employed to acquire the names of a real cross-secti
of the community as was suggested by the Repo
approved by the Judicial Conference Committee.
F.R.D. 409, 425-434. The various public directori
available, voters lists, tax rolls, street lists, and t
like, were not consulted. Instead of utilizing su
sources, even in part, the officials charged with t
statutory duty of selecting prospective jurors simp
delegated that task to a group euphemistically r
ferred to in this case as "suggesters." PH.T. p. 8

Mr. Climer and Mr. Mizell wrote to persons, in so
cases just to banking institutions, to supply juro
Some ninety-six "suggesters" returned names
jurors in response. Mr. Climer and Mr. Mizell e
added a few names of their own, but otherwise d
nothing to discharge their statutory duty. They ma
no effort whatsoever to determine that the perso
whose names had been submitted were qualified.
investigations were made. No questionnaires w
submitted to the persons selected by the "suggester
to be jurors.[3] Nothing was done to ascertain whet
the "suggesters'" lists were a valid cross-section
the community.

[3] In their letters of solicitation to the United States Postmaste
banks, bank officials and state officials, the Commissioner and t
Clerk asked for a cross-section of the community. But they ma
no effort to determine whether this exhortation had been follow
as indeed it was not.

The responsible officials simply took the lists names received and *refilled* the jury box with ther The "suggesters" did not merely put forward nam for the commissioner and the Clerk to consider. Th "suggesters" were vested with the actual power *pr rata* to select the names that went into the jury bo The label "suggester" fails utterly to describe th role they played. In effect the "suggesters" were th jury commission.

The risks manifest in this abnegation of respons bility were compounded by the kinds of persons whom the Jury Commissioner and the Clerk delegate their duty. Mr. Mizell and Mr. Climer did not eng pile a list of "suggesters," if that label may b understandingly applied, representative of a cross section of the community. They made no attempt pass their job to persons from all walks and classe *Rather they limited their requests to bankers, post masters, and a few officials from the local state court* The "suggesters" themselves were the furthest thin from a cross-section of the community. The composi list of the names they submitted, with the token repr sentation of substantial minorities, was an inevitab concomitant of the system used to select the prospe tive jurors.

The second prong to petitioner's attack upon th composition of the grand jury is, if anything, an eve more serious disclosure of the gravity of the eq sequences that flow from the unbridled delegation the power to select federal jurors. The grand jur that returned the indictment in this case, was in th literal sense of the word, a *special* grand jury. It wa *specially* chosen to consider this *specific* case. An the most damning fact of all, the "suggesters" *kne*

at the time that they were compiling their lists of jurors that the persons they were selecting would hear the charges revolving around petitioner. The situation was set up so that the jury could be "stacked" against petitioner, a prejudice-laden circumstance that is odious to the basic principles of our jury system.

From October through December 1962, petitioner was a defendant in a highly-publicized criminal trial in Nashville. That case terminated on December 23, 1962, when the jury, although a majority stood for acquittal, was unable to reach a verdict. Discharging the jury, the trial judge, the Honorable William E. Miller, made an extraordinary statement announcing that he had already signed an order to convene a special grand jury as soon as possible to investigate whether there had been improper attempts to influence prospective petit jurors. Judge Miller's statement made clear that he had no doubt of the honesty and integrity of the jurors who had deliberated; but he said that evidence had already been presented to the court indicating that illegal and improper attempts had been made by close labor-union associates of petitioner to contact and influence certain members of the jury.

Judge Miller's statement naturally received the widest publicity. For example, it appeared verbatim on the front page of the *Nashville Tennessean*, on December 24, 1962, under the headline: "Tampering Charges Face Quiz". The Chief Judge of the District had announced from the bench that he had already received evidence which indicated to him that there had been jury tampering in petitioner's trial by petitioner's close associates. Such a pronouncement was bound to and did excite the news media and, through them, the community. (PR.T. p. 5a.)

The order to which Judge Miller had referred, signed by him on December 22, 1962, directed refilling of the jury box to initiate special grand jury proceedings. The order, of course, was directed to the Clerk of the Court, Mr. Mizell, and the Jury Commissioner, Mr. Climer.

"These two gentlemen moved with the utmost expedition to carry out the order. Within four days, the Clerk and the Commissioner had sent out letters to what they euphemistically call "suggesters". Thirteen days later, the jury box had been filled and the venire had been drawn for the grand jury in this case. The speed of this process is remarkable, all the more so when it is realized that two weekends and the New Years Day holiday came within this period.

During the brief time that the so-called "suggesters" were actually selecting the special grand jury, the purpose for convening the jury received continuing currency. For example, on Tuesday, December 25, the *Nashville Tennessean* carried on its front page a story that began:

> "Evidence uncovered by a probe into at least three alleged jury tampering attempts in the James R. Hoffa conspiracy trial will go to a special grand jury about the middle of January."

On January 6, in the same paper, a story began:

> "The names of 100 persons will be drawn by the federal jury commission the last of this week from which a special grand jury will be selected to investigate alleged jury tampering in James R. Hoffa's conspiracy trial." (PR.T. p. 6a)

Respondent himself confirmed the running barrage of publicity that attended the process of filling the

jury box and selecting the special grand jury. In his remarks to the venire on January 17, 1963, he began:

> "Many of you have no doubt read in the newspapers or heard on the radio that this is to be a special grand jury to investigate a particular matter." (Tr., p. 22).

Respondent stated to the venire that these reports were not "strictly accurate," because the statutes do not provide for a "special grand jury". But, he went on,

> "in one sense, the jury selected here this morning will be a special grand jury. It is no secret that the decision to empanel a second grand jury this term resulted from reports that improper efforts had been made to influence the verdict of a petit jury in a highly publicized criminal case recently tried before the chief judge of this court." (Tr., p. 23). (PR. T. pp. 7a, 18a)

Contemporaneous with the events, respondent himself recognized that the special purpose of the grand jury was "no secret". It was evident to the veniremen. It was, more importantly, equally evident to the "suggesters" as they went about their delegated task to select the jurors.

The extent to which the statutory officials unprescribedly assigned their functions to these "suggesters" has already been sufficiently noted. Its significance here is manifest. The circumstances under which this grand jury was selected, the extraordinary announcement of its purpose, the haste with which it was assembled, make it unlikely that anyone could have selected the jury without being influenced by the advertised intent. When that function is placed in

the hands of persons other than those to whom it has been assigned by law a dangerous condition becomes a malignity.

The prejudice-laden factors do not end here. The final flaw derives from the kind of persons to whom the Clerk and the Jury Commissioner turned to obtain the names of the prospective jurors. Ninety-six "suggesters" sent in names. Of these ninety-six, seventy-seven were United States Postmasters, or acting Postmasters, or officers of federally regulated banks. Better than 80% of the "suggesters" were within these two occupations. The dominant group were the postmasters, who comprised forty-five, nearly half, of all the "suggesters" who submitted names.

Traditionally, as this Court is aware, postmasterships are treated as a highly desired form of political patronage. That is especially true outside major metropolitan areas. The tradition crosses party lines, and the postmasters who comprised the largest group of "suggesters" are from both major political parties. Regardless of party, they are essentially politically minded. In the instance of the Acting Postmasters, such "suggesters" stand in need of personal political support to secure ratification of their positions.

Similar considerations attend the use of bankers to select federal jurors. By profession and custom they are among the most conservative elements of any community. Their institutions are frequently subject to supervision and oversight by the Federal Government and serve as the recipients of federal deposits.

The present Administration has taken very few pains to conceal the campaign it has been waging against petitioner. The Middle District of Tennessee

has been especially sensitized to this propaganda as a result of the prosecution there in the Fall of 1962. Without impugning the motives that impel the excesses on the part of the prosecution and their presumably good faith belief in the correctness of their actions, it remains perfectly clear that this is considered, at least in the Middle District of Tennessee, a political prosecution.

In this climate, there is virtually no likelihood that the system employed to select a grand jury would produce a fair and impartial instrument of justice. The overall conditions are inherently prejudicial.

The district court brushed aside both aspects of petitioner's assault on the indictment. On the hearing of the motion to dismiss, respondent refused to hear the relevant evidence. And, of course, he denied the motion to dismiss.

Respondent rejected the contention of class discrimination in the composition of the grand jury on the patently spurious ground that petitioner had not alleged that there was total exclusion of any class or group. Respondent noted that petitioner alleged there was at least one person from each of the groups. Since there were some members of those classes represented, the Constitution had been satisfied. He held in effect that token representation is permissible. In a memorandum subsequently filed to record the court's reasoning, respondent declared that

> "... no facts were alleged and no proof offered that would tend to support the allegation that any of these groups was excluded. Indeed, the movants' papers themselves showed affirmatively that every one of the groups was in fact represented among those actually summoned for grand jury service." (p. 8).

This memorandum was belatedly issued by respondent, after the case had been taken to the court of appeals and is not a part of the record before that court, but it accurately restates respondent's position at the hearing that token representation is sufficient under the Constitution. (Tr. of July 22, pp. 34, 88-89.)

Respondent likewise refused to hear evidence on the inherently prejudicial circumstances under which the special grand jury was selected and the extent to which that prejudice manifested itself in the actions of the "suggesters". No explanation was given during the hearing to explain the incomprehensible decision not to inquire into conditions so plainly bearing the image of prejudice.

In a memorandum filed a month after the ruling, and while the case was pending in the court of appeals, respondent intimates one possible explanation. Counsel for petitioner had subpoenaed and proposed to call as witnesses most of the "suggesters" to explore that effect upon them of the extraordinary circumstances under which they had selected a jury. Respondent wrote: "On the naked, unsworn and tardy assertions by counsel of the improbable proposition that all these people could be relied upon to plead guilty to the charges against them, the court was asked to permit them to be called." (p. 14). The absurdity of this reasoning is patent. The "suggesters" were not charged with anything to which they might plead guilty or not guilty. They were the immediate participants through whom the prejudice inducing factors emanated. No offer of proof need not be sworn and clearly it was not tardy because it was made at *the hearing of the motion*. Refusal to permit witnesses to be called for the reasons asserted by

respondent is a shocking instance of abuse of judicial discretion.

2. At the hearing on petitioner's motion for dismissal for lack of secrecy of Grand Jury proceedings, two witnesses testified that although neither of them are attorneys for the government they were familiar with the transcripts of the testimony before the Grand Jury. A copy of every transcript was daily received by Walter E. Sheridan who disclosed portions of the transcript of testimony to various special agents of the government. The transcript of the Grand Jury testimony was used for re-interviewing witnesses for the purpose of pointing out discrepancies between their testimony and the testimony given by other witnesses before the Grand Jury on other occasions.

B. The Motion for Change of Venue

A similar fate awaited petitioner's motion for transfer under Rule 21(a) of the Federal Rules of Criminal Procedure. The essence of this motion was the contention that events in the Middle District of Tennessee had reached the point that petitioner could not hope for a fair and impartial trial there.

As noted earlier, petitioner was a defendant in an earlier criminal prosecution in the District. The trial had run from October to December, 1962, and was accompanied by a running barrage of inflammatory and derogatory publicity in the news media. Respondent himself described it to the venire as "a highly publicized criminal case". (Tr. of Jan. 17, 1963, p. 23).

The present charges grew out of that proceeding, beginning with the dramatic and well publicized pronouncement of the Chief Judge that he had already

received evidence of jury tampering and had ordered a special grand jury. The drumfire of publicity continued throughout the deliberations of the Grand Jury and down to the presentation of the motion for transfer. Documentary evidence of this publicity was presented to the district court. (PR.T. pp. 53a-73a)

A copy of hundreds of newspaper clippings presented to the district court were filed in the court below. Since, however, the court below refused to consider the motion to transfer on the grounds that it had no power by mandamus to reverse a district court's refusal to transfer they are not made part of the record in this Court.

In addition, petitioner charged substantial improper instigation of the hostile publicity. The Attorney General himself, has directly and actively intervened by telephoning the Publisher of the *Nashville Banner* concerning the first trial. His close associate and former administrative assistant, John Siegenthaler, now the editor of the *Nashville Tennessean* testified that the Attorney General had consulted with him on the selection of a special prosecutor to be brought into the case, that he assisted the Attorney General in composing the work "The Enemy Within", and that he believed the petitioner was guilty of the charges in the pending indictment. Both Mr. Siegenthaler and the publisher of the other major paper, the Nashville Banner, and the Attorney General are *publicly on record* in Nashville as desirous of having petitioner convicted. (PR.T. pp. 14a-16a)

When the indictment in this case was announced, the Department of Justice issued a press release containing a summary of past and pending criminal ac-

tions involving petitioner. This press release, an extraordinary document in the midst of a federal criminal proceeding, also described the legal proceedings in the manner most prejudicial to petitioner. It was published in the Nashville newspapers. (PR.T. p. 72a)

C. The Mandamus Proceeding

Following denial of the motion to dismiss the indictment and the motion for transfer, petitioner sought relief in the Court of Appeals for the Sixth Circuit by writ of mandamus.

The petition described the events that had transpired in the district court. In connection with the motion to dismiss the indictment, the petition recited the facts that petitioner offered to prove: the class discrimination in the composition of the grand jury and its causes in the system employed by the jury commissioner; the bias and prejudice inherent in the delegation of the task of selection of prospective jurors, especially in the peculiarly delicate circumstances involved here. Petitioner prayed for the aid of the court of appeals in compelling the respondent to permit the establishment of these facts by appropriate evidence, on the ground that the refusal to entertain proof was an arbitrary act and an abuse of discretion.

In connection with the motion for transfer, the petition recited the facts relied upon to establish a climate of prejudice too great to enable a fair and impartial trial, including the facts of Government instigation and provocation. Petitioner contended that the failure to transfer the matter under these circumstances was an arbitrary act and an abuse of discretion.

Without issuing a rule to show cause, and without even hearing argument, the court of appeals held that mandamus would not lie, since it "is only available in extraordinary cases and may not be used as a substitute for appeal." The court below did not regard the selection of jurors by the United States Postmasters, bankers and state officials, and the disclosure of grand jury minutes to unauthorized persons (a practice that will now continue) as an "extraordinary case."

The court also held that "mandamus is not available to control the discretion of the District Court in acting upon a motion to transfer".

REASONS FOR GRANTING THE WRIT

1. The pervasive question presented by this case concerns the scope of the remedy under the writ of mandamus: what issues and concerns are sufficiently grave and sufficiently urgent to warrant invocation of this common-law writ in a criminal case?

In theory, the answer might be none. It is possible to say that the writ of mandamus is never available in a criminal prosecution, regardless of the fundamental importance or the imperative quality of the issues that arise. This Court has never adopted such a position. Nor does it appear to be likely that such an extreme solution will ever be seriously considered. Even the Government does not urge the adoption of a rule totally barring criminal defendants from access to this historic and remedial writ.

If the writ is available in some circumstances, there is no escaping analysis of the issues that have arisen in the present case to determine whether they are

sufficiently grave and sufficiently urgent to come within the proper ambit of the writ of mandamus.

2. The questions petitioner raised through the motion to dismiss the indictment go to the heart of the integrity of the federal jury system. They rest upon cherished guarantees in the Bill of Rights of the Constitution. It is submitted that there is no concern more intrinsically important than the purity of the jury system. The present Attorney General himself recently spoke to the Judicial Conference on this point. He said that the Department of Justice is "deeply concerned" in the proper administration of the jury system "because any successful attack on the jury system necessarily has serious and far-reaching consequences for litigation handled by the Department." He expressed the hope that the Conference and the Judiciary generally would make every effort to make "sure that the administration of the system would not be open to question."[1]

The Department of Justice has not manifested any "deep concern" as yet over the administration of the jury system in the Middle District of Tennessee. The motion to dismiss the indictment, the petition for mandamus, and this petition for certiorari open that system to the most serious question. The far-reaching consequences, of which the Attorney General earnestly spoke, are plainly visible in the vital flaws that have come to light in this litigation.

(a) The disclosure of gross discrimination in the federal jury system on the grounds of race, religion, and economic status presents a problem that ought

[1] Report of the Proceedings of the Judicial Conference of the United States, March 13-14, 1961, p. 3.

to impel the most searching inquiry. It is clear that the discrimination here is inherent in the system employed to select this *and all other* juries in the Middle District of Tennessee. This Court has declared emphatically that exclusion of any class from prospective jury service is anathema to the federal system. E.g., *Ballard* v. *United States*, 329 U.S. 187 (1946); *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217 (1946). In *Ballard* it was said: "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." 329 U.S. at 195. This Court's adherence to that principle is so strong that proceedings have been upset, where exclusion has occurred, even though the defendant is not a member of the excluded class, and even in the absence of any trace of prejudice. Nothing could more clearly underscore the importance which this Court ascribes to protecting the integrity of the federal jury system.

In *Avery* v. *Georgia*, 345 U.S. 559, 561 (1953), this Court held:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill* v. *State of Texas*, 316 U.S. 400, 404."

What was the constitutional duty of state court officials applies *a fortiori* to the federal system. The Jury Commissioner and the Clerk were under a constitutional duty to use a system of selecting jurors that would not result in the exclusion of minority groups.

In this light, the rulings of respondent are grossly unacceptable. Respondent refused to permit petitioner to present evidence of the virtually total exclusion of significant minority groups in the community on the ground that token representation of any class is enough. Such a ruling is not merely error. It is a violent distortion of the principles that this Court has enunciated. It is a refusal even to begin to make judicial inquiry into a malignant condition in a vital organ of federal criminal process.

We submit that mandamus lies to compel the district court to "exercise its authority when it is its duty to do so." (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26).

The question we submit is now sufficiently grave and sufficiently urgent to justify the remedy of mandamus and it is a question of obvious importance which this Court ought to review.

(b) The disclosure that the special grand jury in this case was selected under circumstances so intrinsically prejudicial is probably a basis in itself for dismissal of an indictment, but in any event cannot now be judicially ignored. The grand jurors were selected in the glare of publicity officially proclaiming its purpose to consider charges revolving about one whom evidence was presented has been the target of an obdurate legal crusade by the present Administration. Nearly one-half of those invested with the actual power to select those grand jurors were United States Postmasters, many of them only acting postmasters. In the heated atmosphere generated in the Middle District of Tennessee, it is inconceivable that the grand jury which actually deliberated was fair and impartial. Respondent's failure to make any inquiry

into the matter, his unconditional refusal to permit petitioner to present evidence on the issue, offend the most elementary principles of due process of law.

Recognizing that trial by jury is one of the foundation stones of our system of jurisprudence, the Judicial Conference has established within the past twenty years two committees to study the operation of the jury system. The second of these committees reported in 1961; it was on the occasion of that report that the Attorney General addressed the Conference and made the remarks that were quoted earlier. The latest Judicial Conference committee spoke emphatically to two of the abuses present in this case. The committee said that insofar as a jury commissioner and clerk "uncritically accept the recommendations of local 'key men,' they run the risk of infecting the federal jury process with the evils" of race and class discrimination. 26 F.R.D. 428.[5] The committee also declared that, when the "key men" or "suggester" system is used, those invited to submit names should be "those citizens of the district *who are most likely to be impartial.*" 26 F.R.D. 429. (Emphasis supplied.) "By varying the sources of the names, it appears that a fair and qualified representation of all the community is more likely to be obtained." Ibid.[6]

[5] The report of the Judicial Conference Committee was published in Vol. 26 of Federal Rules Decisions, to which page citations have been made.

[6] Under the Judicial Code, 28 U.S.C. § 332, orders of a judicial council shall promptly be carried into effect by the district judges. We do not know whether the Sixth Circuit Judicial Council ordered implementation of the Judicial Conference report. At any rate, the district judges in the Middle District of Tennessee totally ignored the recommendation of the Judicial Conference in regard to the selection of jurors.

In *Glasser v. United States*, 315 U.S. 60, 85-86 (1942), this Court unequivocally condemned delegation of the duty of the jury commissioner and the clerk.

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

In this case, not one but several steps were taken impairing substantial liberties. The Clerk of the District Court and the Jury Commissioner here did accept uncritically the names submitted by those invited to submit prospective jurors. Mr. Mizell and Mr. Climer did not vary their sources; nearly half of their invitees were United States Postmasters. Seventy-seven of the ninety-six persons who submitted names were either bankers or postmasters. And, in the *peculiar circumstances of this prosecution* and the declared and publicized purpose of the special grand jury, these so-called "suggesters" were the least *impartial citizens* in the district.

The Government saw nothing exceptionable in these developments and stoutly resisted the efforts of petitioner to spread the evils on the record. The extremity of the Government position was starkly revealed in the statement by the prosecutor that petitioner was not entitled to a fair and impartial grand jury. He

was willing to assume, only for purpose of argument, that petitioner has a right to have an indictment dismissed if it was returned by a biased grand jury. (Tr. of July 22, 1963, p. 130). When counsel for the United States can make such a statement in open court and succeed in persuading the trial court to suppress defense efforts to show how unfair and partial the grand jury was in fact, there is surely the need for a higher judicial authority to restore the balance.

Whether the denial of the motion to dismiss the indictment for implied bias,[7] or the refusal to entertain proffered evidence of actual bias, in the extraordinary circumstances outlined here are matters sufficiently grave and sufficiently urgent to justify resort to the remedy of mandamus is a question of manifest importance. Compare *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. The respondent has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Whether that supervision can be exercised through the court of appeals on writ of mandamus is an important question which has not been, but ought to be, settled by this Court.

(c) In recent years, this Court has twice expressly authorized and required exercise of the writ of mandamus to protect the right to jury trial in civil controversies. *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). See also *Ex parte Simons*, 247 U.S. 231

[7] See the opinion of Murrah, C. J., in *Cassis* v. *United States*, 315 F. 2d 614, 620 (10th Cir. 1963): "It is not uncommon for the law to say that one occupying a status or relationship which raises a suspicion of bias or prejudice shall not be called into the jury box."

(1917). In *Dairy Queen*, the Court reemphasized "the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury. . . ." 369 U.S. at 472. Even the dissenting Justices in *Beacon Theatres* declared that: "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial." 359 U.S. at 511.

The Government has attempted to distinguish these and similar precedents on the basis of a verbal formula that, upon investigation, is merely a play on words. Nevertheless, this formula was adopted by the court of appeals. According to the Government, there is a distinction between this case, where it is said that the respondent lawfully exercised judicial discretion, and cases like *Dairy Queen* and *Beacon Theatres*, said to involve a "repudiation of jurisdiction", or a "refusal of the court to exercise its authority". In the opinion of the court of appeals, the putative distinction was expressed as the difference between "discretion" and "mandatory duty".

On analysis, this distinction vanishes. Respondent does not have lawful discretion to accept an indictment returned by a grand jury from which substantial minority classes have been excluded, in violation of the Constitution of the United States. Respondent does not have lawful discretion to accept an indictment from a grand jury fatally infected with the bias and prejudice inherent in the circumstances of this case. Respondent does not have lawful discretion to completely ignore evidence offered by the defense to establish the discrimination and the prejudices. Respondent does not have lawful discretion to permit

the Jury Commission to *delegate their duties to fill a jury box* to United States Postmasters and bankers. These matters go to the fundamental question of legitimacy of the grand jury.

Fundamental questions of this nature, affecting the legitimacy of the body, are truly jurisdictional, in the proper sense of that word. Precisely such a question calls for resolution by writ of mandamus.

The position here urged does not conflict with *Rocke* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), the principal case upon which the Government and the court of appeals rely. *Rocke* held merely that, while the court of appeals had power to issue the writ of mandamus, the circumstances *there* involved did not warrant exercise of that power. The Court said that

> "the indictment was returned by the requisite number of duly qualified grand jurors, acting under order of the court convening the grand jury in session. The objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court." 319 U.S. at 27.

The circumstances of the present case can hardly be categorized as "at most an irregularity". Nor can it be said that the indictment was returned by "duly qualified grand jurors". The matters raised here are constitutional in dimension.

An indictment returned by a grand jury from which substantial majorities have been systematically excluded is void. An indictment is void when returned

by a grand jury specially selected by United States Postmasters, bankers, and state court officials after public announcement that the target of the grand jury was to be one who has been the object of a relentless legal crusade by the Department of Justice. See *Everett Brown*, 121 U.S. 1; where after the indictment was amended after it had been returned by the grand jury, it was thought, in a habeas corpus proceeding, to be "the indictment of a grand jury". Because of the fundamental flaws in the composition of the body that selected the jurors that returned the indictment in this case, in constitutional terms petitioner has not been charged by indictment of a legally constituted grand jury.

One attribute of those fundamental questions that underlay the legitimacy of legal bodies, the matter we call jurisdiction, is the effect of the issue upon other proceedings. The challenge made in this case is directed essentially to the method of selecting all juries in the Middle District of Tennessee. Hundreds of other cases are involved. Delay in rooting out the impurities can and will have the most pernicious effect on the District and perhaps many others. This conveys the sense of urgency which, coupled with the manifest gravity of the issues, calls forcefully for the exercise of the writ of mandamus.

The considerations of gravity and urgency that underlie the resort to the writ of mandamus are

this kind of proceeding apply with equal force to the application to this Court for writ of certiorari. The Court of Appeals' conclusion that it lacks power to provide a remedy has far-reaching consequences for this litigation and for the meaningful scope of the historic mandamus remedy. The courts of appeals need the guidance of this Court on the standards they should apply in dealing with petitions for mandamus.

In terms both of intrinsic importance and extrinsic significance, the issues here presented raise vital questions of federal law that ought to be resolved by this Court.

3. The decision of the court below, with respect to the availability of the writ of mandamus to review denial of a motion to transfer, is directly in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Platt* v. *Minnesota Mining & Mfg. Co.*, 314 F. 2d 369 (7th Cir. 1963). The *Platt* case is a criminal proceeding, in which the Seventh Circuit *reviewed and reversed* a trial court's denial of transfer under Rule 21 of the Federal Rules of Criminal Procedure.

This Court has already granted certiorari to review the decision of the Court of Appeals in the *Platt* case, No. 113, October Term 1963. The petition for certiorari was filed by the Solicitor General, who did not even question the jurisdiction of the court of appeals to issue the writ of mandamus. Since that time, the Government has prepared its brief on the merits, in which it raises for the first time its doubts on the scope of the mandamus remedy.

This Court has also agreed to decide two civil cases that focus squarely on the remedy of mandamus. *Par-*

sons v. *Chesapeake & Ohio Ry.*, No. 32, October Term 1963, also comes up from the Court of Appeals for the Seventh Circuit, which held that mandamus would lie to order a case transferred. A Third Circuit case, *Barrack* v. *Van Dusen*, 309 F. 2d 953 (3d Cir. 1962), involves a court of appeals' vacation of an order to transfer a civil cause; this Court has granted certiorari to review the propriety of this use of mandamus. No. 80, October Term 1963.

During this Term, the Court will be considering on a variety of fronts the scope of the mandamus remedy. This case adds a dimension not present in the cases which the Court has already agreed to review. Because of the direct conflict with the *Platt* case, it is submitted that the entire matter, with full perspective, should be considered by this Court.

4. Grand juries have traditionally acted in secret in the United States: *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677. Rule 6(e) of the Federal Rules of Criminal Procedures provides that matters occurring before the Grand Jury may not be disclosed to agents of the government, who are not attorneys for the government. Transcripts of the Grand Jury testimony were daily delivered to an agent of the government who was not an attorney, without the authorization of the Grand Jury, and indeed the district court. There is no practical difference between witnesses testifying in the presence of unauthorized persons in the grand jury room and permitting unauthorized persons to read witness' grand jury testimony. Both are forbidden by law and prejudicial to the defendant is presumed. Witnesses were confronted with the testimony given by other witnesses and the concept of a grand jury having a traditional function as an impartial

body standing between the defendant and the government here vanished. The Grand Jury simply becomes an agent for discovery for the sole benefit of the Government. Petitioner is without any adequate remedy for this flagrant abuse of the Federal Rules of Criminal Procedure except for the immediate dismissal of the indictment at this time, since at the trial all evidence must relate to the question of guilt or innocence of the charge. In *McCullough v. Honorable George Cosgrave*, 309 U.S. 635, this Court granted petitioner leave to file an original petition for mandamus to correct continual violations of the Rules of Civil Procedure and granted relief. We submit that violation of Rules of Criminal Procedure involving personal liberty, should also be entitled to correction by mandamus.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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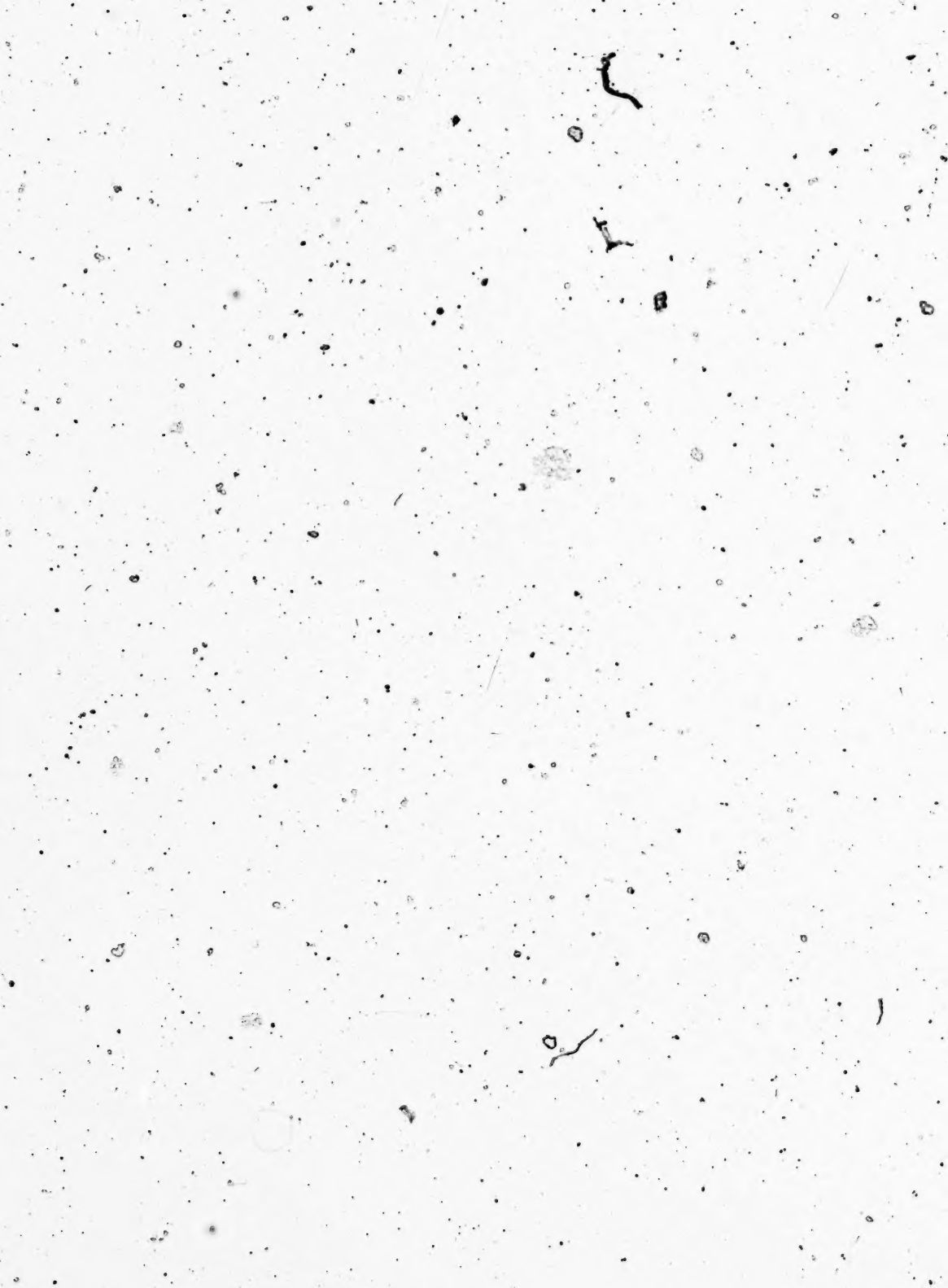
October, 1963



APPENDIX

APPENDIX A

Filed September 20, 1963

Opinion and Order

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15,340

ORIGIN

James R. Hoffa, *Petitioner*,

Honorable Frank Gray, Jr., United States District Judge for the Middle District of Tennessee, *Respondent*.

Before: Weick, O'Sullivan and Phillips, *Circuit Judges*.

The petition for a Writ of Mandamus seeks peremptory orders against the District Judge to compel him to vacate orders entered by him denying petitioner's motions to dismiss the indictment and for a change of venue and to enter orders granting said motions.

It is the claim of petitioner that the members of the Grand Jury which indicted him were improperly selected and its proceedings were not kept secret; that the Court erred in limiting his proof in the hearing on the motion to dismiss and in denying the motion; that because of adverse newspaper publicity there exists so great a prejudice against him in the district where the indictment is pending that he cannot there obtain a fair and impartial trial; and the Court abused its discretion in not transferring the case to another district.

The District Judge had jurisdiction to hear and determine the motion to dismiss the indictment. Whether he erred in limiting the proof and in denying the motion to dismiss may be reviewed by us only on appeal after a final order has been entered in the case. The order denying the motion to dismiss was not a final appealable order. 28 U.S.C. § 1291; *Parr v. United States*, 351 U.S. 513, 517;

ailable only in extraordinary cases and
a substitute for appeal. *Parr v. United*
, 531; *Bankers Life & Casualty Co. v.*
379; *Ex Parte Fuhsy*, 332 U.S. 258;
ed Milk Association, 319 U.S. 21, 26. In
ates District Court, 318 F. 2d 588 (C.A.
order, a petition for Mandamus which
orders of the District Court denying
the indictment and to transfer the case

the motion for change of venue, the Dis-
required to exercise his discretion. We
andamus is not available to control the
District Court in acting upon a motion
v. United States District Court, supra;
F. 2d 945 (C.A. 6) cert. denied 364
dle Eastern Pipe-Line Co. v. Thornton,
A. 6); *Lemon v. Druffel*, 253 F. 2d 680

s on *Dairy Queen, Inc. v. Wood*, 369 U.S.
tres, Inc. v. Westover, 359 U.S. 500 and
the Application of Annie S. Simons for
mus Against the Honorable Charles M.
dae, 247 U.S. 231. We think these cases
The distinction is that where a party is
e law to a jury trial, the court has no
under a mandatory duty to grant it. In
ons in the case at bar, the Court was an
id exercise judicial discretion.

xamination of the prospective petit jurors
ase on the merits should throw some light
uestion whether defendant can obtain a
al jury in the district.

r a Writ of Mandamus is denied.